(16,166.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 115.

THE HARTFORD FIRE INSURANCE COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 12, 1897.

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, begun and held at the city of St. Paul, Minnesota, in the eighth circuit, on the first Monday in May, it being the sixth day of May, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the eighth day of March, A. D. 1895, a transcript of record, pursuant to a writ of error to the circuit court of the United States for the northern district of Iowa, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Hartford Fire Insurance Company *et al.* were plaintiffs in error and The Chicago, Milwaukee & St. Paul Railway Company, defendant in error; which said transcript of record is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, } *ss*:
Northern District of Iowa, }

Pleas before the circuit court of the United States in and for the northern district of Iowa, Cedar Rapids division, at a term begun and holden at Cedar Rapids, in said district, on the first Tuesday of April, A. D. 1893, before the Hon. O. P. Shiras, judge of the northern district of Iowa.

HARTFORD FIRE INS. COMPANY *et al.*, Plaintiff-,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*, Defendants. } No. 25. Law.

Be it remembered, that heretofore, to wit on the 15th day of July, A. D., 1893, a transcript from Jones county district court, in foregoing-entitled cause was filed in the office of the clerk of the circuit court of the United States, in and for the northern district of Iowa, Cedar Rapids division, in the words and figures following, to wit:

In the District Court of Iowa in and for Jones County, May Term, 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire & Company, Defendants.

Petition.

Plaintiffs state:

That the Hartford Fire Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of Connecticut, that the Springfield Fire and Marine Insurance Company is now and was at all times
2½ mentioned herein, a corporation duly organized and existing under the laws of the State of Massachusetts, that the Fire Association of Philadelphia, Pennsylvania, is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of Pennsylvania; that the North British and Mercantile Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of Great Britian; that the Hanover Fire Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of New York; that the Citizens' Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of New York, and that the Dubuque Fire and Marine Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of Iowa, and that all said insurance companies above named were and now are transacting the business of fire insurance in the State of Iowa.

That G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, are now and were at all times mentioned herein copartners doing business at the city of Monticello, Jones county, Iowa, under the firm name and title of Simpson, McIntire and Company, having an office for the transaction of business at said Monticello, Iowa.

That on the 11th day of November, 1892 and for a long time prior thereto, said firm of Simpson, McIntire and Company was the owner of the following-described property, to wit: a cold-storage building and warehouse attached, situated on railroad ground on the east side of the railway track of the defendant, The Chicago, Milwaukee

& St. Paul Railway Company, in the city of Monticello, Jones county, Iowa and of a large and valuable stock of butter in cases and eggs in cases in said building.

That the defendant, The Chicago, Milwaukee & St. Paul Railway Company on the 11th day of November, 1892, and for a long time prior thereto and now is a corporation duly organized and existing under the laws of the State of Wisconsin, and was at all said times and now is the owner and in the possession of and using and operating a certain railroad or railway leading from the city of Davenport, in the State of Iowa, to a point known as Jackson Junction in the county of Winneshiek, State of Iowa, and running by and immediately upon the west side of the said property of the firm of Simpson, McIntire & Company, situated and described as aforesaid in the city of Monticello, Iowa.

3 And plaintiffs further say that on or about the 11th day of November, 1892, at or about the hour of 2.45 p. m., on said day, said defendant, in the operation of its said railway and while moving its engines and cars on its said railway track alongside the property of said Simpson, McIntire and Company, above described, negligently set fire to and destroyed by fire the said property of said Simpson, McIntire and Company, situated and described as aforesaid to the amount in value at the time and place aforesaid of the sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88), being a loss and damage on said building in the sum of seven thousand dollars ($7,000) and upon the stock of butter in cases in said buildings, of nineteen thousand one hundred and eighteen dollars and eighty-eight cents ($19,118.88) and upon eggs in cases in said buildings of one thousand dollars ($1,000), whereby said firm of Simpson, McIntire and Company was damaged in the said sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88).

At the time said fire occurred, said Simpson, McIntire and Company had insurance against fire on said property by written and printed policies of insurance in each of the plaintiff's insurance companies and in the respective amount- hereinafter named, and after said losses and damage occurred, and prior to the commencement of this suit, said Simpson, McIntire and Company demanded and received payment from each of said insurance companies, plaintiffs, under their said policies of the respective amounts hereinafter stated, amounting in the aggregate to the sum of twenty-three thousand four hundred and fifty dollars ($23,450) an itemized statement of the names of said insurance companies and the amounts of each of said policies and the amounts paid and received thereon aforesaid being as follows, to wit:

Name of company.	Am't of policy.	Am't paid.
Hartford Fire Insurance Co.....	$10,000 00	$9,729 75
Niagara Fire Insurance Co.....	3,000 00	2,918 90
Springfield Fire & Marine Insurance Co...	3,000 00	2,918 90
Fire Association of Philadelphia, Pa.....	2,500 00	2,432 45
Fire Association of Philadelphia, Pa.....	1,000 00	890 00
North British & Mercantile Insurance Co..	2,500 00	2,225 00
Hanover Fire Insurance Company and Citizens' Insurance Company, under a joint (policu) known as the New York Underwriters' Agency.....	1,500 00	1,335 00
Dubuque Fire & Marine Insurance Co....	1,500 00	1,000 00

Plaintiffs aver that beside the above-named insurance paid and received, there was no other insurance on said property, and
4 that by reason of said payments by said insurance companies, each of said insurance companies became subrogated to all the right of the firm of Simpson, McIntire and Company against said defendant railway company on account of said loss and damage by fire, caused as aforesaid, to the amount of the payments made by each of said insurance companies respectively, to said firm of Simpson, McIntire and Company, amounting in the aggregate to the sum of twenty-three (—) four hundred and fifty dollars ($23,450).

Plaintiffs aver that the said firm of Simpson, McIntire and Company has an interest in the cause of action herein set forth equal to the difference between the whole amount of said loss and damage as aforesaid, and the aggregate amount paid said Simpson, McIntire and Company by said insurance companies aforesaid, and that Simpson, McIntire and Company refuse to join as plaintiffs herein and therefore are made defendants in this action.

Plaintiffs aver that due and legal demand has been made upon said railway company, defendant, by the plaintiffs for the amount of said loss and damage paid by them as aforesaid, prior to the commencement of this action, and that said defendant railway company has neglected and refused to pay the same or any part thereof.

Whereof the plaintiffs demand judgment against the said defendant railway company for the sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88) with six per cent. interest thereon from the 11th day of November, 189?, together with the costs of this action.

R. W. BARGER,
THOMAS BATES, &
HERRICK & HICKS,
Attorneys for Pl'ffs.

STATE OF IOWA, } ss:
Jones County, }

I, R. W. Barger, being duly sworn, say that I am one of the attorneys for the plaintiffs in this action; that I (*ahev*) read the fore-

going petition and know what it contains, and that the matters therein stated are mainly in my personal knowledge, and true as I verily believe, and that those facts therein stated which are not within my personal knowledge, I say upon information and belief, are true as I verily believe.

R. W. BARGER.

Subscribed and sworn to before me by R. W. Barger, this 10th day of May, A. D. 1893.

——— ———,
Notary Public, Jones Co., Ia.

5 Indorsed: No. 2464. In the district c't. of Jones Co., Iowa, May term, 1893. Hartford Fire Insurance Company *et al.*, pl'ffs, *vs.* C., M. & St. P. R'y Co. *et al.*, def'ts. Petition. Filed with copy May 11, 1893. W. D. Sheean, clerk. Folio fee, $4.00. R. W. Barger, Thos. Bates and Herrick & Hicks, att'ys for pl'ff-.

In the District Court of Iowa in and for Jones County, May Term, 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and G. W. Simpson, D. I. McIntire, H. P. Harris, and J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire and Company, Defendants.

Original Notice.

To the Chicago, Milwaukee & St. Paul Railway Company, and to G. W. Simpson, D. I. McIntire, H. P. Harris, and J. L. Hyde, copartners, doing business under the firm name and style of Simpson, McIntire and Company:

You are hereby notified that the petition of the plaintiffs in the above-entitled cause will be on file in the office of the clerk of the district court of Iowa, in and for Jones county, on or before the 12th day of May, 1893, claiming of you the sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88) with interest thereon from the 11th day of November, 1892, on account of loss and damage by fire to the cold-storage building and warehouse attached, of said firm of Simpson, McIntire and Company, situated on the railroad grounds and immediately on the east side of said Chicago, Milwaukee and St. Paul Railway Company in the city of Monticello, Iowa, and to the stock of butter in cases and eggs in cases in said buildings, which said fire

was set out or caused by the Chicago, Milwaukee and St. Paul Railway Company in the operation of its said railway, on or about the 11th day of November, 1892, and at or about the hour of 2.45 p. m., on said day, the said insurance companies above named as plaintiffs having paid to the said firm of Simpson, McIntire and Company on account of said loss and damage by fire, the sum of twenty-three thousand four hundred and fifty dollars ($23,450) and
6 by such payments been subrogated to all the rights of said firm of Simpson, McIntire and Company against said defendant railway company to the amount so paid by said insurance companies to said firm of Simpson, McIntire and Company, on account of said loss and damage by fire aforesaid.

Said firm of Simpson, McIntire and Company having an interest in this cause of action and not joining in plaintiffs herein, are therefore made defendants. No personal judgment, however, is claimed against the said firm of Simpson, McIntire and Company.

Now, unless you appear thereto and defend on or before noon of the second day of the May term, A. D. 1893, of said court, which will commence and be holden at the court-house in the city of Anamosa, Jones county, Iowa, on the 22d day of May, A. D. 1893, default and judgment will be rendered against you.

R. W. BARGER,
THOMAS BATES,
HERRICK & HICKS,
Attorneys for Pl'ffs.

Constable's Return.

STATE OF IOWA, } ss:
Jones County, }

This notice came into my hands May 10th, 1893, and I certify that I served the same on the within-named defendants by reading the same to A. I. Jackson, general agent of the Chicago, Milwaukee & St. Paul Railway Company at Monticello, Iowa, and delivering to him personally a true copy of the same in Jones county, Iowa, on the 10th day of May, 1893, and by (readon-) the same to D. E. Pond, treasurer of Simpson, McIntire & Company at Monticello, Iowa, and delivering to him personally a true copy thereof in Jones Co., Iowa, on the 10th day of May, 1893.

W. J. YOUNG, *Constable.*

Subscribed and sworn to before me by W. J. Young, this 10th day of May, A. D. 1893.

E. H. HICKS,
Notary Public in & for Jones Co., Iowa.

Indorsed: No. 3464. Hartford Fire Ins. Co. *et al. vs.* Chicago, Milwaukee & St. Paul R'y Co. Original notice. Filed May 15, 1893. W. D. Sheean, clerk. Constable fees, $1.40. Paid by Barger. Barger, Bates, Herrick & Hicks.

7 In the District Court of Iowa within and for Jones County, May Term, A. D. 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire Insurance and Marine Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendants, and G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire & Company, Nominal Defendants.

Petition of C., M. & St. P. R'y Co. for Removal of Cause to United States Circuit Court.

To the honorable district court aforesaid:

Your petitioner, The Chicago, Milwaukee & St. Paul Railway Company, the defendant above named, respectfully states and shows to this honorable court: That the above-entitled action is brought by the above-named plaintiffs in said district court of Iowa, within and for Jones county, to recover alleged damages in the (suȷ) of $27,118.88 with six per cent. interest from November 11th, 1892, and costs of suit on account of alleged loss and damage by fire to a certain cold-storage building and attached warehouse of said firm of Simpson, McIntire and Company (named as codefendants therein), situated on the railway grounds and immediately east of the railway track of this defendant, said Chicago, Milwaukee & St. Paul Railway Company, in the city of Monticello, in said Jones county, Iowa, and to a certain stock of butter and eggs in cases, in said building; which fire is alleged to have been set out or caused by this defendant, The Chicago, Milwaukee & St. Paul Railway Company, in and by the operation of its said railway, and on or about the 11th day of November, 1892. The said insurance companies, plaintiffs above named, claiming to have paid to said firm of Simpson, McIntire and Company on account of said alleged loss and damage by fire, the sum of $23,450, and by reason of (sȳch) payment claim to have been subrogated to all legal rights of said firm of Simpson, McIntire and Company against this defendant railway company, if any, and to the amount so alleged to have paid on account of alleged loss and damage by fire as aforesaid.

That said action is wholly of a civil nature, and that the matter and amount in dispute therein exceeds, exclusive of interests and costs, the sum or value of two thousand dollars.

8 That the controversy in said suit is wholly between citizens of different States. That your petitioner, The Chicago, Milwaukee & St. Paul Railway Company, defendant therein, is a foreign corporation and was at the time of the commencement of

this suit, and still is, a non-resident of the State of Iowa, and was as (aforesaud) and is a corporation duly organized, created and existing under and by virtue of the laws of the State of Wisconsin, and a citizen of said State of Wisconsin, having its principal place of business in the city of Milwaukee, in said State of Wisconsin.

That the plaintiff, The Hartford Fire Insurance Company, was at the time of the commencement of this suit and still is, a corporation duly organized, created and existing under and by the laws of the State of Connecticut, and a citizen of said State of Connecticut; and that the plaintiff, Niagara Fire Insurance Company, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of New York, and a citizen of said State of New York; and that the plaintiff, Springfield Fire and Marine Insurance Company at (thr) time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of Massachusetts, and a citizen of said State of Massachusetts; and that the plaintiff, Fire Association of Philadelphia, Pennsylvania, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of Pennsylvania, and a citizen of said State of Pennsylvania; and that the plaintiff, North British & Mercantile Insurance Company at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of *the* Great (Brit*ian*), and a citizen of said Great (Brit*ian*); and that the plaintiff, Hanover Fire Insurance Company, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of New York, and a citizen of said State of New York; and that the plaintiff, Citizens' Insurance Company, of New York, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of New York, and a citizen of said State of New York; and that the plaintiff, Dubuque Fire & Marine Insurance Company, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of Iowa, and a citizen of said State of Iowa.

9 That G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, copartners doing business under the firm name of Simpson, McIntire & Company, named as codefendants with your petitioner in this action, were all at the time of the commencement of this suit, and still are, citizens and residents of said State of Iowa, and doing business as such copartners in the city of Monticello, in said Jones county, and State of Iowa.

Your petitioner further alleges and charges that said G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, copartners under the firm name of Simpson, McIntire and Company, were not at the time of the commencement of this suit, and are not now, necessary

or (*por*per) parties defendant in and to this suit, or the alleged cause of action therein set up. That if they had, or have any legal interest whatever therein, the same was, and is, adverse to your petitioner, and as coplaintiff-, and not as codefendants, in said action. That their legal interest, if any, is joint with said plaintiffs in and to the alleged cause of action sued upon, and cannot be disunited or separated therefrom, and that plaintiffs in this suit expressly (*sek*k) and claim to recover also the entire alleged interest of said codefendants, and they make no claim of recovery against said codefendants or against any defendants except your petitioner.

And your petitioner avers and charged that its said codefendants, S. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, copartners, etc., were at the time of the commencement of this suit, and still are, merely nominal defendants, and not united in interest with this defendant in any manner, nor adverse to plaintiffs' interest, if any, and that they were made such codefendants for th- express and sole purpose of attempting thereby to defeat and prevent the legal right of your petitioner to remove said cause from said State court to the circuit court of the United States, all of which will more fully and at large appear by reference to the original petition now on file in this court and cause, which is hereby incorporated herein and expressly made a part hereof by direct reference, and will establish the allegations hereof.

That the time within which the defendant- *is* required by the laws of the State of Iowa, and the rules of this court to answer or plead to the petition in said action has not yet expired.

That your petitioner has made and herewith files a bond with good and sufficient security for its entering in the circuit court of the United States for the northern district of Iowa, Cedar Rapids division, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this hon. court to proceed no further herein except to accept this petition and said bond, and to make the order of removal required by law and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Iowa, Cedar Rapids division, and it will ever pray.

MILLS AND KEELER,
Attorneys for Petitioner.

STATE OF IOWA, }
County of Linn, } *ss:*

I, Charles B. Keeler, being duly sworn, do say that I am one of the attorneys for The Chicago, Milwaukee & St. Paul Railway Company, the petitioner in the above-entitled cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegat-ons therein contained are true, as I verily believe; that I am authorized to make and execute this petition on its behalf.

CHARLES B. KEELER.

Subscribed by said Charles B. Keeler in my presence and by him sworn to before me this 20th day of May, A. D. 1893.

[SEAL.] C. D. HARRISON,
Notary Public in and for Linn County, Iown.

Indorsed: No. 2464. In the district court of Jones county, Iowa. Hartford Fire Ins. Co. *et al.*, plaintiff-, *vs.* The Chi., Mil. & St. Paul R'y Co. *et al.*, defendants. Petition *for* C., M. & St. P. R'y Co. for removal to U. S. cir. ct. Tax copy fee, $2.50. Mills & Keeler, attorneys for def't R'y Co. Cedar Rapids, Iowa. C. D. J. 70. Filed May 23d, 1893, with copy. W. D. Sheean, clerk.

Bond.

Know all men by these presents: that the Chicago, Milwaukee & St. Paul Railway Company as principal, and A. T. Averill as surety, are held and firmly bound unto Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire & Marine Insurance Company, Fire Association of Philadelphia, (Pennsylvanie), North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New
11 York, Dubuque Fire & Marine Insurance Company, in the penal sum of one thousand (1,000) (dollard) for the payment whereof, well and truly to be made unto the said Hartford Fire Insurance Company, Niagara Insurance Company, Springfield Fire & Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, their successors and assigns, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Chicago, Milwaukee & St. Paul Railway Company, having petitioned the district court of the State of Iowa, within and for Jones county, for the removal of a certain cause therein pending, wherein Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire & Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British & Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire & Marine Insurance Company, are plaintiffs, and The Chicago, Milwaukee & St. Paul Railway Company is defendant; to the circuit court of the United States in and for the northern district of Iowa, Cedar Rapids division.

Now, if the said Chicago, Milwaukee & St. Paul Railway Company, your petitioner, shall enter in the said circuit court of the United States, on the first d-y of the next session copies of all process, pleadings, record entries, depositions, testimony and other proceedings in said cause, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed

thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals this 20th day of May, A. D. 1893.

THE CHICAGO, MILWAUKEE &
ST. PAUL R'Y COMPANY, [SEAL.]
By MILLS & KEELER. *Its Att'ys.*
A. T. AVERILL. [SEAL.]

STATE OF IOWA, } ss:
Linn County, }

I, A. T. Averill, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Iowa; that I am worth the sum of over five thousand dollars, beyond the amount of my debts; that
12 I have property in the State of Iowa and county of Linn liable to execution, equal to the sum of over five thousand dollars.

A. T. AVERILL.

Subscribed and sworn to before me this 20th day of May, A. D. 1893.

[SEAL.] NATHANIEL K. BEECHLEY,
Notary Public in and for Linn County, Iowa.

Indorsed: No. 2464. In the district court of Jones county, Iowa. Hartford Fire Ins. Co. *et al.*, plaintiff-, *vs.* C., M. & St. P. R'y Co. *et al.*, defendant-. Bond for removal to U. S. circuit court. Tax copy for $100. Mills & Keeler, attorneys for defendant-. Cedar Rapids, Iowa. Filed and approved May 23d, 1893. W. D. Sheean, clerk.

STATE OF IOWA, } ss:
Jones County, }

Be it remembered, that at a term of the district court of Iowa, holden in and for said county at the court-house in Anamosa therein, on the 31st day of May, A. D. 1893, were present the Honorable J. H. Preston, sole presiding judge of said court, W. A. Hogan, sheriff of said county, and W. D. Sheean, clerk of said court, when the following proceedings were had, done, and entered of record, to wit:

HARTFORD FIRE INSURANCE COMPANY *et al.*
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants. } At Law.

Upon application cause is transferred to the United States circuit court for the northern district of Iowa, Cedar Rapids division, and clerk will certify up the record accordingly.

STATE OF IOWA, } ss:
Jones County, }

I, W. D. Sheean, clerk of the district court in and for said county, do hereby certify that the foregoing is a true and complete copy of

the record, and that the following papers herewith, to wit, petition and copy; original notice; petition of Chicago, Milwaukee and St. Paul Railway Company for removal to United States circuit court; and bond for same, are all of the papers filed in the case wherein Hartford Fire Insurance Company *et al.* are plaintiffs and The Chicago, Milwaukee & St. Paul Railway Company *et al.* are defendants, as the same appears of record in my office; I further certify that the following costs are due in this court:

13	W. D. Sheean, clerk, including copy of all papers.....	$9 50
	W. J. Young, constable, serving original notice.....	1 40
Plaintiffs' attorneys folio fees.		4 00
Mills & Keeler folio fees.....		3 50
Total		$18 40

In testimony whereof I hereunto set my hand and affix the seal of said district court at my office in Anamosa, Iowa, this 8th day of July, A. D. 1893.

[SEAL.] W. D. SHEEAN, *Clerk.*

Filed July 15th, 1893.

A. J. VAN DUZEE, *Clerk,*
By P. H. FRANCIS, *Deputy.*

And afterwards, to wit, on the 12th day of September, A. D. 1893, there was filed in the office of the clerk of said court in said cause, an answer of def't, which answer is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Cedar Rapids Division, September Term, 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURANCE Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Dubuque Fire and Marine Insurance Company, Citizens' Insurance Company of New York, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendants, and G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire and Company, Nominal Def'ts.

Answer of Chicago, Milwaukee & St. Paul Railway Company.

Comes now the defendant, The Chicago, Milwaukee & St. Paul Railway by Mills & Keeler, its attorneys, and for its answer to the plaintiffs' petition herein says:

It admits that at the times in said petition mentioned, the plaintiffs were, and still are insurance corporations as alleged, that this

defendant was and is a railway corporation operating a line of railway through the city of Monticello, Iowa, as alleged and that G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, were copartners doing business at Monticello, Iowa, under the firm name of Simpson, McIntire & Company.

14 But this defendant denies each and every other (allegations) in the said petition contained.

Wherefore, defendant prays for judgment for its costs herein.

MILLS & KEELER &
BURTON HANSEN,
Def't's Att'ys.

Indorsed: In the U. S. circuit court, northern district of Iowa, C. R. div. Hartford Fire Ins. Co. *et al.*, plaintiffs, *vs.* The C., M. & St. P. R'y Co., defendants. Answer of def't C., M. & St. P. R'y Co. Mills & Keeler, att'ys for def't R'y Co. Filed Sept. 12th, 1893. A. J. Van Duzee, clerk, by B. H. Francis, deputy.

And afterwards, to wit, on the 2d day of April, A. D. 1894, there was filed in the office of the clerk of the United States court in and for said district, an amended answer, which amended answer is in the words and figures following, to wit:

Amendment to Answer.

In the Circuit Court of the United States, Northern District Iowa, Cedar Rapids Division.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs, *et al.*,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Comes now the defendant railway company, by Mills & Keeler, its attorneys and, by leave of court amends its answer in this cause by adding thereto the following:

Count 11. And for its further and separate defense, this defendant says: That the premises upon which were situated the building and property alleged to have been destroyed by fire, were then, and still are, a part of the depot grounds and lands of and belonging to this defendant at said Monticello station in Jones county, Iowa; that the sole right and occupancy of said Simpson, McIntire & Company therein, was under and by virtue of a written lease, which

15 was executed on February first, 1890, by this defendant company to said Simpson, McIntire & Company, and under which they entered into and occupied said premises from and after

that date, said lease being in the words and figures following, to wit:

This indenture, made this first day of February, A. D. 1890, by and between the Chicago, Milwaukee & St. Paul Railway Company, party of the first part, and Simpson, McIntire & Co., of Boston, Mass., parties of the second part,

Witnesseth, that the said party of the first part does hereby lease, demise, and let unto the said parties of the second part, the following piece or parcel of land lying in the county of Jones, in the State of Iowa, and described as follows, to wit:

That part of the depot grounds of said railway company at Monticello, county and State aforesaid, as shown on a map on file in the office of said railway company, more particularly described as follows:

Beginning on the north line of Third street, 77 feet east from center line of main track of Farley branch; thence north at right angles to said street line 130 feet; thence east parallel to said street line 45 feet; thence south at right angles 130 feet to north line of Third street; thence west 45 feet to the place of beginning.

To hold, for the term of one year from the date hereof for the purpose of erecting and maintaining thereon a cold-storage warehouse, the said lessee yielding and paying therefor the annual rent of five dollars in advance, and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors and administrators, and assigns do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of any building or (building-) now on, or which may hereafter be placed on said premises, or of the fixtures, appurtenances, or other personal property, remaining inside or outside of said buildings, by fire occasioned or originated by sparks, or burning coal from the locomotives, or from any damage done by trains, or cars running off the track or from the carelessness or negligence of employés or agents of said railway company; and further, that the said parties of the second part will in no way obstruct or interfere with the track of said railway company in using said premises.

And the parties of the second part agree to keep said premises in as good repair and condition as the same (ore) in at the commencement of said term; to pay, as the same become due and payable all (taxes) and assessments, general and special, that may be
16 levied or assessed thereon during the time they remain in possession thereof; and to quit and surrender said premises at the expiration of said term on demand of said railway company; and in case such demand shall not be made at the expiration of said term, to pay said rent at the rate and in the installments aforesaid, as long as they remain in possession thereof; and that they will not under-lease said premises without the written consent of said railway company.

And said parties of the second part further agree to quit and surrender said premises at any time before the expiration of said

first-mentioned term or at any time when default shall be made in the payment of said rent or taxes as aforesaid, within thirty days after demand of said railway company, and that upon the expiration of said thirty days, it shall be lawful for said railway company to expel them therefrom.

That parties of the second part may (and hereby agree, that they will, if said railway company shall so require) remove from said premises within thirty days after any termination of this lease all structures owned or placed thereon by them.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

THE CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,
By P. M. MEYERS, *Secretary.*
SIMPSON, McINTIRE & CO.

In presence of—
S. H. CROLIUS AND
L. LODUE.
ANDREW NIMING.

Indorsed: 757. Short form. The Chicago, Milwaukee & St. Paul R'y Co. to Simpson, McIntire & Co., Monticello, Iowa. Lease dated Feb'y 1st, 1890. Expires Jan'y 31st, 1890. Rental $5.00 per annum. Ground for cold-storage warehouse. $5.00. Paid May 15, '90.

That from the first day of February, 1891, down to and including the time of said fire, Simpson, McIntire & Company remained in possession and occupancy of said premises under the terms and conditions of said original lease, and not otherwise; and were and continued to be tenants holding over under the lease aforesaid and subject to all its provisions.

And this defendant say- that as to the alleged destruction by fire of the building and property mentioned in plaintiffs' petition, all such risks, and the loss therefrom, were assumed by said Simpson,
McIntire & Company, and this defendant company was re-
17 leased therefrom as one of the express conditions of said lease and occupancy, and plaintiffs cannot now recover therefor.

Wherefore defendant prays judgment herein.

MILLS & KEELER,
Attorneys for Defendant.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John A. Hinsey, being first duly sworn, on oath do depose and say, that I am an officer, to wit, the special agent of The Chicago, Milwaukee & St. Paul Railway Company, defendant herein, and as such am authorized to and do verify this answer on its behalf; that I have read the foregoing amendment to answer in the above-en-

titled cause, and know the contents thereof. and that the same are true as I verily believe.

JOHN A. HINSEY.

Subscribed and sworn to before me by the said John A. Hinsey on this 29th day of March, A. D. 1894.

[SEAL.] W. D. MILLARD,
Notary Public in and for Cook County, Illinois.

Indorsed: No. 25, law. In the U. S. circuit court, nor. dist. of Iowa, Cedar Rapids division. Hartford Fire Ins. Co. *et al.*, plaintiff-, *vs.* The Chicago, Milwaukee & St. Paul R'y Company (defencant). Amendment to answer. Mills & Keeler for defendant. Filed April 2d, 1894. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

And afterwards, to wit, on the 3d day of April, A. D. 1894, the following proceedings were had in said cause, by said court and entered of record on page 108 of vol. 1 of the record of said court, to wit:

HARTFORD FIRE INSURANCE CO. *et al.*
vs.
CHICAGO, MILWAUKEE & ST. PAUL R'Y COMPANY *et al.* } No. 25. Law.

Now on this 3d day of April, (A*L*D.) 1894, this cause coming before the court upon motion of defendant railway company for leave to file amendment to answer, and the (moti*ng*) being submitted to the court, leave is granted defendant to file said amendment to answer.

And on the 2d day of April, A. D. 1894, there was filed in the office of the clerk of said court in said cause, a demurrer to amendment to answer, which demurrer is in the words and figures following to wit:

18 In the Circuit Court of the United States, Northern District of Iowa, Cedar Rapids Division.

HARTFORD FIRE INSURANCE CO. *et al.*
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*

Demurrer to Amendment to Answer.

The plaintiffs demur to the amendment to defendant's answer herein, being count 2 of the answer contained in said amendment, upon the following grounds:

1. The facts stated in said count do not amount to a defense, in that said count does not deny the facts charged in the petition and does not contain any matter or things in avoidance of plaintiffs' right of action herein.

2. Said count does not show that the fire complained of in the petition was set merely through the negligence of defendant or its employés. For (ough-) that appears from said answer the said fire may have been wilfully and criminally set by defendant and its employés.

3. Said count does not show that the lease therein pleaded was in force or effect at the time of the (firs) complained of in plaintiffs' petition, and does not show any agreement at that time on the part of Simpson, McIntire & Company, except to pay rent and taxes as specified in and by said lease.

4. The lease pleaded by defendant does not show any agreement to exempt defendant from liability for fires set by its locomotives in operating its lines of railway. Said lease does not show what locomotives are intended or referred to therein or thereby.

5. The agreement contained in said lease is too vague, indefinite and uncertain to exempt defendant from liability for the fire set out, as charged in plaintiffs' petition herein.

6. The agreement alleged to be contained in said lease and pleaded in the said second count, is contrary to public poli- and void, in that it seeks to exonerate defendant from liability for fires willfully or criminally set out by it as well as for fires set out by it through its own negligence or the negligence of its employés.

7. Said lease does not contain any release which in law is effective or sufficient to exonerate defendant from liability for the fire set out, as charged in plaintiffs' petition.

8. It is not alleged that plaintiffs or any of them had knowledge of the alleged agreement set out in the lease pleaded by
19 defendant in and by the said second count and without knowledge thereof the plaintiffs were not bound thereby.

Wherefore plaintiffs pray judgment.

R. W. BARGER,
CHAS. A. CLARK,
Att'ys for Plaintiffs.

Indorsed: Hartford Fire Insurance Co. *et al. vs.* Chicago, Milwaukee & St. Paul R'y Co. *et al.* Demurrer to amendment to answer. Filed April 2d, 1894. A. J. Van Duzee, clerk, by P. H. Francis, deputy. R. W. Barger and Chas. A. Clark, att'ys for pl'ffs.

And on the 3d day of April, A. D, 1894, the following proceedings were had in said cause by said court, and entered of record on page 108 of vol. 1 of the record of said court, to wit:

HARTFORD FIRE INSURANCE CO. *et al.*
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*
} No. 25. Law.

Now on this 3d day of April, A. D. 1893, this cause coming before the court upon the demurrer of plaintiffs to defendants' amend-

ment to answer, the plaintiffs appearing by R. W. Barger, Esq., and Charles A. Clark, Esq., their attorneys, and the defendant railway company by Mills & Keeler, its attorneys, argument of counsel was heard and the demurrer was fully submitted to the court, and was by the court taken under advisement.

And afterward, to wit, on the 4th day of April, A. D. 1894, there was filed in the office of the clerk of said court in said cause, a disclaimer, which disclaimer is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Cedar Rapids Division, April Term, 1894.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURANCE Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and G. W. Simpson, D. I. McIntire, H. P. Harris, and J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire and Company, Defendants.

And now comes the above-named G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, copartners doing business under
20 the firm name of Simpson, McIntire and Company, and file their disclaimer herein, disclaiming any interest whatever in the above-entitled action, or of any right to recover any damages against said defendant, The Chicago, Milwaukee & St. Paul Railway Company in said action, and further state that they were made parties to this action without their knowledge or consent, and ask that this action be discontinued as against them, and that they be relieved from all costs therein.

Dated this 3rd day of April, A. D. 1884.

G. W. SIMPSON,
D. I. McINTIRE,
H. P. HARRIS,
J. L. HYDE,
Copartners, Doing Business under the Firm Name and Style of Simpson, McIntire & Co.,
By W. O. JOHNSON,
Att'y-in-fact.

Indorsed: No. 25. In U. S. circuit court, northern district of Iowa, Cedar Rapids division. Hartford Fire Ins. Co. *et al.*, pl'ffs, *vs.* The Chi., Mil. & St. Paul R'y Co., def't. Disclaimer of Simpson, McIntire & Co. Filed April 4, 1894. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

And, afterwards, to wit, on the 11th day of September, A. D. 1894, there was filed in the office of the clerk of said court in said cause, an opinion of the court, which opinion is in the words and figures following, to wit:

In United States Circuit Court in and for the Northern District of Iowa, Cedar Rapids Division, Sept. Term, 1894.

HARTFORD FIRE INSURANCE COMPANY *et al.*
vs.
CHICAGO, MILWAUKEE & ST. PAUL R'Y COMPANY. } No. 25. Law.

Submitted on demurrer to answer.

Herrick & Hicks, C. A. Clark, R. W. Barger, for plaintiffs.
Mills & Keeler, for defendant.

SHIRAS, *District Judge:*

The questions presented by the demurrer to the answer in this cause (gro*n*) out of the following state of facts, as disclosed by the pleadings in the case.

21 On the first day of February, 1890, the defendant railway company executed a lease in writing to the firm of Simpson, McIntire & Co., of a named portion of its depot grounds at Monticello, Jones county, Iowa, for the term of one year, with the right to (e*x*ect) and maintain on the leased premises a cold-storage warehouse, "and upon the express condition, that the said railway company, its successors, and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors, administrators and assigns, do hereby expressly release them from all liability, or damage by reason of any injury to or destruction of any building or buildings, now on or which may hereafter be placed on said premises, of the fixtures appurtenances or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coals from the locomotive or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employees or agents of said railway company."

Simpson, McIntire & Co., as authorized in this lease, erected a cold-storage warehouse on the leased premises and continued in the occupation thereof until November 11th, 1892, when the building and contents were destroyed by fire, which fire, it is averred in the petition, was due to the negligence of the company in moving and operating its trains.

At the time of the fire Simpson, McIntire & Co., held insurance policies in the plaintiff companies upon the warehouse and its contents, consisting of butter and eggs, upon which policies the companies paid to Simpson, McIntire & Co., the aggregate sum of $27,118.88 which amount they now seek to recover against the defendant railway company as assignees of the rights of Simpson, Mc-

Intire & Co. As a defense to this claim, the railway company pleads the stipulation in the lease already cited and the plaintiff demur thereto on the ground that the exemption from liability sought to be secured by the conditions contained in the lease are void because contrary to public policy. This demur- was argued orally before me at the April term of this court and it then appeared that a case involving the question at issue was pending before the supreme court of Iowa; that upon the first hearing before that court, it had been held that such stipulation or conditions were void as against public policy, but upon a rehearing and reargument the court had held to the contrary, and had sustained the validity of the condition stipulating for exemption from liability and that a second petition for rehearing had been filed and was then pending before that court.

Under these circumstances final action on the demurrer was postponed, awaiting the decision of the supreme court of Iowa.

22 Since then the supreme court of Iowa has refused the petition for rehearing, thereby finally affirming the validity of an exemption from liability for fire negligently caused, such as is contained in the lease to Simpson, McIntire & Co.

Griswold *v.* Illinois Central R. R., 57 N. W. Rep., 843.

Counsel for the parties have now finally submitted the demurrer upon very full and able briefs. Upon behalf of the plaintiffs it is strenuously argued that this court is not bound by the ruling of the State supreme court upon question- involved but on the contrary that it is the duty of the court to exercise its independent judgment upon the question whether the condition contained in the lease is or is not valid.

Counsel for plaintiffs have presented in their brief citations from a large number of cases *described* by the Supreme Court of the United States which iterate and reiterate the rule that the courts of the United States are not bound by the decisions of State courts upon questions of general law, or upon questions arising out of matters committed by the Constitution to national control, or even upon the construction of State constitutions or statutes, when the question at issue is the effect of such constitution- and statutes upon pre-existing contracts.

But it does not seem to me that these cases reach the real point at issue upon this demurrer.

If the demurrer presented the legal question whether a contract which was in substance contrary to public policy, was enforceable in the courts of the country and it should appear that the supreme court of Iowa had held as a preposition of law, that the fact that the contract was contrary to public policy was not a bar to its enforcement through the aid of judicial process, this court would clearly not be bound by the decision of the State court. The effect upon the validity or enforceability of a contract of the fact that its provisions are admittedly contrary to public policy would be a question of general law, upon which this court must exercise its own judgment.

In fact, however, this court and the supreme court of Iowa, are in accord upon this question of general law, and in both forms it is held that a contract contrary to public policy is invalid.

The real question for consideration is, How shall it be determined whether the contract is or is not contrary to public policy? The subject-matter of the contract may be such that it affects the country at large or it may be local in its nature.

23 The nature of the subject-matter determined the sources from which light must be sought upon the question of fact whether the provisions of a given contract are or not contrary to public policy. In other words, there is a public policy, of the nation, applicable to all matters wherein the people at large are interested, including those committed to the control of the National Government, and coextensive with the boundaries of the Union and also a State public policy, adapted to the circumstances of the locality embraced within the boundaries of the State, and applicable to all matters within State control.

Thus in Greenwood on Public Policy, it is said that any contract made by a competent party upon valuable consideration, is valid unless it binds the maker to do something opposed to the public policy of the State or nation.

Greenwood on Public Policy, page 1, rules 1 and 11.

In seeking to ascertain the requirements of the public policy of the nation, the principal sources of information are the Constitution of the United States, the statutes enacted by Congress and the decision- of the courts, Federal and State, and in case there should be a divergence in the views of the Federal and State courts, upon a question of national public policy the conclusion reached in the Federal courts must be accepted as the best evidence of what the requirements of the national public policy are.

On the other hand, when seeking to determine the public policy of the State towards a subject within State control, the principal sources of information are State constitution, and statutes and the decisions of the courts, State and Federal, and in case of a divergence between them, the decisions of the State court must be accepted as the best evidence of the public policy of the State.

Vidal *v.* Girard's Executors, 2 How., 127–197.

Swan *v.* Swan, 21 Fed. Rep., 299.

Thus we are brought to the question whether the contract found in the lease to Simpson, McIntire & Co., deals with a subject-matter which falls within National or State control. On behalf of the defendant it is argued that the lease and the stipulations therein contained create or convey a title to real estate and thus form part of a subject-matter clearly within State control. I am not prepared to go to this extent in construing the subject-matter of the contract between the parties. The lease as a whole, creates and conveys a title to real estate and if the question at issue was one touching the title conveyed it would come within the rule, that the de-

24 cisions of the State courts, which constitute a rule of property, will be accepted and followed by the Federal courts.

The lease however in addition to its clauses creating and conveying a leasehold interest to Simpson, McIntire & Co., contains other provisions constituting a contract, not affecting the title to the realty, but dealing with the question of the liability for fire accidentally or negligently set out or caused in the operation of the railway of the defendant, a question apart from that of title to realty, wherein the decisions of the State court- become a rule of property.

On behalf of plaintiffs it is argued that the conditions in the lease affects the question of interstate commerce, a matter of national control, because cold-storage warehouses, adjacent to railways and the depots thereof, are needed to protect produce, like butter, when being gathered for shipment out of the State.

To a certain degree interstate commerce is dependent upon the erection and maintenance of proper warehouses for the reception and storage of the products of the country, but the fact that such buildings are so used does not place them beyond the power of the State. Thus it is clearly within the power of the State to direct the character of the buildings that may be built for storage purposes. As a protection against fire, the State may enact that elevators, depots, warehouses and the like shall be built of brick or iron and not of wood, and the power of the State in this respect be denied on the ground that such buildings are needed for and used in commerce between the States.

Neither is there force in the suggestion that the conditions contained in the lease pertain to the duties and obligations resting upon common carriers, engaged in interstate commerce.

There is nothing in the pleadings which shows that the property burned was used in connection with interstate commerce, but even if that was the fact, the conditions of the lease do not deal with the relations of common carrier, and the public, nor did these relations exist between the defendant and Simpson, McIntire & Co., with regard to the property destroyed by the fire which consumed the warehouse and its contents. The stipulation- in the lease so far as they affect this case, deal with the *dult* and obligation resting upon the defendant company growing out of the fact that the company in its business, used the dangerous agency of fire. The right to use the agencies of fire and steam in the movement of railway trains in Iowa, is derived from the legislation of the State and it certainly cannot be denied that it is for the State to determine what safeguards must be used to prevent the escape of fire and to define the extent of the liability for fires resulting from the operations of trains by means of steam locomotives.

This is a matter within State control. The legislation of the State determines the width of the right of way used by the companies; the State may require the companies to keep the right of way free from combustible material; it may require the depot and other buildings used by the company to be of stone, brick or other like material, when built in cities or in close proximity to other buildings. The State, by legislation, may establish the extent of the liability of railway companies for damages, resulting from fires caused in the operation of the roads. When providing for acquisi-

tion or condemnation of the right of way, the State may declare the public uses to which the right of way may be subjected. Can there be any doubt that the State may empower the railway companies to contract with third parties for the erection of warehouses or elevators on the right of way to be used for the reception and storage of grain and other products, preparatory to shipment upon the railway, and that the State can define the extent of the liability of the railway companies for damages resulting to such property from fires caused by the operation of trains upon the railway. These considerations and others of like import which might be suggested, clearly show that it is a matter within State control to determine the extent of the liability for injury by fire resulting from the operation of railway trains under charters or authority granted by the State. Therefore when the question arises whether a given contract intended to define or limit the liability of a railway company, with respect to injury resulting from fires, is a valid or not, it must be solved by ascertaining what is the statute law or public policy of the State wherein the fire may have occurred. In the case now before the court, if the contract contained in the lease does not violate any of the provisions of the constitution of the State of Iowa, or is not contrary to any statute of the State or is not contrary to the public policy of the State as otherwise declared, it cannot be held invalid. It is not claimed that the contract contained in the lease violates any provision of the State constitution or statutes but it is averred that it is repugnant to public policy, as already shown, evidence of the public policy of a State is ordinarily to be sought in the constitution and statutes and judicial decisions of the State.

The right of parties to contract freely and fairly cannot be denied upon the ground of an adverse public policy, unless it clearly appears that there is a recognized or established public
26 policy touching the subject-matter which will be violated if the contract is enforced.

The burden is upon the plaintiffs in this case of showing that the contract in question is contrary to the public policy of the State of Iowa. No express provisions of the constitution or statutes of the State are cited as evidence of the public policy of the State and the only final decision of the supreme court of the State upon the question, holds that a contract such as is found in the lease to Simpson, McIntire & Co., is not contrary to the public policy of the State. Upon what theory can this court hold that the invalidity of the contract is established? Is this court justified in ignoring the decision of the supreme court of Iowa, as evidence of the public policy of the State? Clearly not.

But it is argued on behalf of the plaintiffs that the final decision of the supreme court of Iowa in the Griswold case should not be considered, because it was not rendered until after this contract was entered into and in fact not until after this suit was commenced.

The Supreme Court of the United States, in applying that provision of the Federal Constitution which declares that no State shall pass a law impairing the obligations of contracts, has uniformly *been* held, that the validity of a contract was to be deter-

mined by the laws in force at the date of the contract, whether evidenced by express statutes or by the decisions of the courts and that if thus tested, the contract was valid at its inception, it could not be rendered invalid by a subsequent change in the law of the State; whether that change was brought about by legislative enactment or by a difference in the decisions of the courts. This provision of the Constitution is intended to prevent the impairment of the obligation of contracts, valid when made, by a subsequent change in the law of the State, and the principle has no application to the case at bar. When the lease to Simpson, McIntire & Co. was executed in February, 1890, it had not been ruled or held in Iowa, that conditions such — are contained therein were contrary to public policy. It cannot be maintained that Simpson, McIntire & Co. were induced to execute the lease in reliance upon any decisions of the courts of Iowa that such conditions were invalid and void, and hence there has not been such a change in the State law evidenced by the decisions of its courts, as would bring the case within the provision of the Constitution of the United States.

In fact, the decision in the Griswold case instead of impairing the obligation of the contract entered into by Simpson, McIntire
27 & Co., sustains the validity thereof. Furthermore, even if it were true that at the time, the conditions therein contained limiting the liability of the railway company for damages caused by fire, were then in fact contrary to the public policy of the State, but the requirements of such public policy have since been changed by statutory enactment or by the divisions of the supreme court of the State, so that when the fire occurred in November, 1892, such exemption from liability was not contrary to public policy, would not such change in the law of the State have the effect of rendering the condition in the contract enforceable by judicial aid.

The final decision in the Griswold case shows that on the 30th day of April, 1890, more than two years before the fire happened in this case, the public policy of the State was not adverse to the validity of exemptions from liability such as are contracted for in the lease to Simpson, McIntire & Co.

In Eqell *v.* Daggs, 108 U. S. 143, this general question came before the Supreme Court in a suit for the foreclosure of a mortgage brought in the State of Texas. The defense was a plea of usury. It appeared that when the mortgage debt was contracted, a statute of the State of Texas declared all contracts for the payment of interest at a rate greater than twelve per cent. per annum to be void, but that the principal sum based without interest could be recovered. The note secured by the mortgage, included interest at the rate of twenty per cent. per annum, and therefore, under the statute in force at the date of the note the contract for interest was invalid.

Subsequently the State of Texas adopted a new constitution, which in terms repealed all usury laws without any saving clause as to existing contracts.

The Supreme Court held that the defense of usury could not be maintained, the general principle being stated as follows:

"Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever (-he) statute gives under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract.

The benefit which he has received as the consideration of the contract, which contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been re-
28 peatedly announced and acted upon by this court. The right which the curative or repealing act takes away in such a case, is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provisions was ever designed to protect."

The rule applicable to cases of the character of that now before the court wherein a party seeks to evade the obligation of a contract to which he is a party, on the ground of public policy is, that the court will not lend its aid to enforce the contract, if at the time its aid is sought, the contract is contrary to the existing public policy. The court, in such case, refuses its aid for the enforcement of the contract, not because such is the right of either of the contracting parties, but because the public interests are adverse to the enforcement of the contract. If, however, at the time when the aid of the court is sought to enforce the terms of an existing contract the public interests do not demand that the court should refuse to aid in enforcing the contract according to its terms, the court would not be justified in (refusinf) its aid, simply because at some previous time, under the then existing laws and as circumstances then were, such aid would have been refused if then demanded.

Thus in the present case, the defendant asks the court to (enforve) in its favor the conditions of the contract existing between it and Simpson, McIntire & Co.

The plaintiff-, as assignees of the rights of Simpson, McIntire & Co., object to the enforcement of the terms of the contract on the ground that the same are contrary to the public policy of the State. To sustain this objection to the enforcement of the contract, it must appear that the contract is adverse to the now existing public policy of the State, for unless that be true, the court is not justified in refusing its aid for the enforcement of a contract which is confessedly good between the parties thereto.

Therefore, the inquiry is, What is the public policy of the State of Iowa upon the question of the right of railway companies to exempt themselves from liability for damages caused by fire under the circumstances pertaining to this case. No better evidence has been brought to the attention of the court upon this subject than that afforded by the decision of the supreme court of the State in the

Griswold case, and relying upon that decision I hold that the contract contained in the lease to Simpson, McIntire & Co., exempting the defendant company from liability for fire, is not now contrary to the public policy of the State of Iowa, and hence is not invalid.

29 The demurrer to the answer is therefore overruled.

Indorsed: Filed Sept. 11, A. D. 1894. A. J. Van Duzee, clerk.

And on the 11th day of September, A. D. 1894, the following proceedings were had in said cause, by said court, and entered of record on page 132 of volume 1 of the record of said court, to wit:

HARTFORD FIRE INSURANCE COMPANY *et al.* } No. 25.
vs. } Law.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. *et al.* }

Now on this 11th day of September, A. D. 1894, the above-entitled cause coming before the court upon the demurrer of plaintiff to amendment to answer,

The demurrer was fully submitted to the court, and the court being fully advised in the premises, overrules said demurrer.

Plaintiff excepts and elects to stand on the demurrer.

HARTFORD FIRE INSURANCE COMPANY *et al.* } No. 25.
vs. } Law.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. *et al.* }

Now on this 11th day of Sept., A. D. 1894, the above-entitled cause coming before the court upon motion of defendant for judgment for costs in said cause, plaintiffs electing to stand upon the rulings of the court and refused to plead further,

It is therefore ordered and adjudged by the court, that defendant, The Chicago, Milwaukee & St. Paul Railway Company, have and recover of and from the plaintiffs the costs of these proceedings, taxed at $256.25, and that execution issue therefor.

Plaintiffs except to judgment.

And afterwards, to wit, on the 20th day of February, A. D. 1895, there was filed in the office of the clerk of said court in said cause, a petition for writ of error, which is in the words and figures following, to wit:

30 In the United States Circuit Court, Northern District of Iowa, Cedar Rapids Division.

THE HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(*To*) To said court and the judges thereof:

Your petitioners, The Hartford Fire Insurance Company, Niagara

Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia (Pennsylvania), North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company, respectfully state that at the September, 1894, term of said court, there was an action then and there pending wherein your petitioners wer- plaintiffs and The Chicago, Milwaukee & St. Paul Railway Company, was defendant, in which a judgment was then and there rendered and entered in favor of the said Chicago, Milwaukee and St. Paul Railway Company, against your petitioners, for the costs of said action. And your petitioners have filed therein in the office of the clerk of said United States circuit court, an assignment of errors in said action, as required by the rules of the United States circuit court of appeals, for the eighth circuit; and now here bring their bond in the sum of five hundred dollars with good and sufficient surety conditioned as required by law and the rules of said United States circuit court of appeals.

Wherefore your petitioners pray that a writ of error be granted in said action, directed to the judges of said circuit court of the United States, for the northern district of Iowa, Cedar Rapids division, commanding that the record in said cause be certified to said United States circuit court of appeals, and that a stay of proceedings be ordered until said writ of error shall have been determined.

THE HARTFORD FIRE INSURANCE COMPANY,
NIAGARA FIRE INSURANCE COMPANY,
SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA, PENNSYLVANIA,
NORTH BRITISH AND MERCANTILE INSURANCE COMPANY,
31 HANOVER FIRE INSURANCE COMPANY,
(CIRIZENS') FIRE INSURANCE COMPANY OF NEW YORK,
DUBUQUE FIRE AND MARINE INSURANCE COMPANY,
By R. W. BARGER AND
CHAS. A. CLARK, *Their Attorneys.*

Order.

A writ of error and supersedeas are hereby ordered and allowed as prayed for in the foregoing petition this 20th day of February, 1895.

O. P. SHIRAS,
Judge District Court.

Indorsed: The Hartford Fire Insurance Company *et al. vs.* The Chicago, Milwaukee & St. Paul Railway Co. Petition for writ of error and supersedeas. Filed (February) 20, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

And on the 20th day of February, A. D. 1895, there was filed in the office of the clerk of said court in said cause, an assignment of errors, which is in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Iowa, Cedar Rapids Division.

THE HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURANCE Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Assignment of Errors.

The Hartford Fire Insurance Company and other plaintiffs above named, respectfully aver and show that there is manifest error on the face of the record in the above-entitled cause in the following particulars, to wit:

1. The court erred in overruling plaintiffs' demurrer to the amendment to defendant's answer, being demurrer to count two of the answer, contained in said amendment and committed separate and distinct error in overruling said demurrer upon each of the following grounds:

a. The fact- stated in said count do not amount to a defense in that the said count does not deny the facts charged in the
32 petition, and does not contain any matter or thing in avoidance of plaintiffs' right of action herein.

b. Said count does not show that the fire complained of in the petition was set merely through the negligence of defendant or its employés. For aught that appears from said answer the said fire may have been (willfully) and criminally set by defendant and its employés.

c. Said count does not show that the lease therein pleaded was in force or effect at the time of the fire complained of in plaintiffs' petition, and does not show any agreement at that time on the part of Simpson, McIntire & Company, except to pay rent and (taxes) as specified in and by the said lease.

d. The lease pleaded by defendant does not show any agreement to exempt defendant from liability for fires set by its locomotives in operating its line of railway. Said lea-e does not show what locomotives are intended or referred to (therein) or thereby.

e. The agreement contained in said lease is too vague, indefinite

and uncertain to exempt defendant from liability for the fire set out as charged in plaintiffs' petition herein.

f. The agreement alleged to be contained in said lease and pleaded in the said second count, is contrary to public policy and void, in that it seeks to exonerate defendant from liability for fires (willfully) or criminally set out by it, as well as for fires set out by it through its own negligence or the negligence of its employés.

g. Said lease does not contain any release which in law is effective or sufficient to exonerate defendant from liability for the fire set out as charged in plaintiffs' petition.

h. It is not alleged that plaintiffs or any of them had knowledge of the alleged agreement set out in the lease pleaded by defendant in and by the (ssid) second count and without knowledge thereof the plaintiffs were bound thereby.

2. The court (erree) in rendering judgment in this action, upon the overruling of plaintiffs' said demurrer, in favor of the said defendant and against the plaintiffs.

R. W. BARGER,
CHAS. A. CLARK,
Attorneys for Plaintiffs.

Indorsed: The Hartford Fire Insurance Company *et al. vs.* The Chicago, Milwaukee & St. Paul Railway Co. Assignment of errors. Filed February 20th, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

33 And on the said 20th day of Feb., A. D. 1895, there was filed in the office of the clerk of said court in said cause, a bond, which bond is in the words and figures following, to wit:

Know all men by these presents that we, the Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, as principals and —— —— as surety are held and firmly bound unto the Chicago, Milwaukee and Saint Paul Railway Company, in the full and just sum of five hundred dollars, to be paid *by* the said Chicago, Milwaukee and Saint Paul Railway Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with (out) seals and dated this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at the September term, A. D. 1894, of the circuit court of the United States for the Cedar Rapids division of the northern judicial district of Iowa, in a suit depending in said court, between The Hartford Fire Insurance Company and others, being the principals above named, plaintiffs, and The Chicago, Milwaukee & St. Paul Railway Company, defendant, judgment was rendered against the said Hartford Fire Insurance Company and others, the

principals, in this bond above named, and the said Hartford Fire Insurance Company and others, the said principals in this bond, have obtained a writ of error, of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said Chicago, Milwaukee & St. Paul Railway Company, citing and admonishing it to appear in the United States circuit court of appeals for the eighth circuit, at the city of Saint Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Hartford Fire Insurance Company and others, the said principals in this bond, shall prosecute said writ of error to effect
34 and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

HARTFORD FIRE INSURANCE COMPANY,
NIAGARA FIRE INSURANCE COMPANY,
SPRINGFIELD FIRE AND (MARINE) INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA, PENNSYLVANIA,
NORTH BRITISH AND MERCANTILE INSURANCE COMPANY,
HANOVER FIRE INSURANCE COMPANY,
CITIZENS' INSURANCE COMPANY OF NEW YORK,
DUBUQUE FIRE AND MARINE INSURANCE COMPANY,
DUBUQUE FIRE AND MARINE INSURANCE COMPANY,
By R. W. BARGER, *Their Attorney.*
A. R. WEST, *Surety.*

Approved by—
O. P. SHIRAS, *Dist. Judge.*

Indorsed: United States circuit court, Cedar Rapids division of the northern district of Iowa. The Hartford Fire Insurance Company *et al. vs.* The Chicago, Milwaukee & St. Paul R'y Co. Bond. Filed 20th day of February, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the case of The Hartford Fire Insurance Company *et al.*, plaintiff-, *vs.* The Chicago, Milwaukee & St. Paul Rail-
35 way Company, defendant, No. 25 law, which are necessary to a hearing in the appellate court, as fully as the same remain on file and of record in my office.

Circuit Court U. S. Northern District of Iowa.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Cedar Rapids, in said district, this 7th day of March, A. D. 1895.

A. J. VAN DUZEE,
Clerk U. S. Courts, Northern District of Iowa,
By P. H. FRANCIS, *Deputy.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the Cedar Rapids division of northern district of Iowa, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1894, thereof, between The Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company, plaintiffs, and The Chicago, Milwaukee & Saint Paul Railway Company, defendant, a manifest error hath happened, to the great damage of the said Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit
36 court of appeals, for the eighth circuit, on or before the 21st day of April, 1895, to the end that the record and proceedings aforesaid being inspected, the United States court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of February, in the year of our Lord one thousand eight

Circuit Court U. S. Northern District of Iowa.

hundred and ninety-five. Issued at office, in the city of Cedar Rapids, with the seal of the circuit court of the United States for the

Cedar Rapids division of the northern district of Iowa, dated as aforesaid.

A. J. VAN DUZEE,
Clerk Circuit Court United States, Cedar Rapids Division of the Northern District of Iowa,
By P. H. FRANCIS, *Deputy.*

Allowed by—
O. P. SHIRAS, *Judge.*

Service of the above writ of error is hereby accepted this 4th day of March, 1895.

This writ come into my hands on the 4th day of March, A. D. 1895, and I certify that I personally served the same upon the within-named Chicago, Milwaukee and St. Paul Railway Company, by reading the same to M. P. Mills, one of the attorneys of record of the defendant in error, and by delivering to him a true copy of the same at Cedar Rapids, Linn county, Iowa, on the 4th day of March, A. D. 1895.

W. M. DESMOND,
U. S. Marshal of the Northern Dist. of Iowa,
By M. L. HEALY, *Deputy.*

Fees.

Service	$2 00
Copy	1 00
Mileage, 1	06
	$3 06

37 *Return to Writ.*

UNITED STATES OF AMERICA,
Cedar Rapids Division of the Northern District of Iowa, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Circuit Court U. S. Northern District of Iowa.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in city of Cedar Rapids, this 7th day of March, A. D. 1895.

A. J. VAN DUZEE,
Clerk of said court,
By P. H. FRANCIS, *Deputy.*

No. —. United States circuit court, Cedar Rapids division of the northern district of Iowa. The Hartford Insurance Co. *et al. vs.* The Chicago, Milwaukee and Saint Paul Railway Co. Writ of error. To the circuit court of the United States for the Cedar Rapids division of the northern district of Iowa. Filed 4th day of March, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

United States of America to the Chicago, Milwaukee and Saint Paul Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the northern district of Iowa, Cedar Rapids division, wherein The Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and (Mercantile) Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of
38 error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable O. P. Shiras, judge of northern district of Iowa, this 20th day of February, 1895.

O. P. SHIRAS,
Judge of the United States District — Northern District of Iowa.

Service of the above citation is hereby accepted this — day of February, 1895.

THE CHICAGO, MILWAUKEE & SAINT PAUL RAILWAY COMPANY,
By —— ——, *Its Attorneys.*

The within citation came into my hands on the 4th day of March, A. D. 1895, and I certify that I personally served the same upon the within-named Chicago, Milwaukee and St. Paul Railway Company by reading the same to M. P. Mills, one of the att'ys of record of the defendant in error and by delivering to him a true copy of the same on the 4th day of March, A. D. 1895, at Cedar Rapids, Linn county, Iowa.

W. M. DESMOND,
U. S. Marshal of the Northern Dist. of Iowa,
By M. L. HEALY, *Deputy.*

Fees.

Service	$2 00
Copy	1 00
	$3 00

The Hartford Fire Insurance Co. *et al. vs.* The Chicago, Milwaukee and Saint Paul Railway Co. Citation. Filed March 4th, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

UNITED STATES OF AMERICA, } ss.:
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify and return that the writ of error which is hereto attached, was served and filed in my office at Cedar Rapids on the 4th day of March, A. D. 1895, and a copy thereof at the same time lodged in my office, and

39 I now return said writ of error, and annexed hereto and hereto attached an authenticated copy of the record in the cause mentioned in said writ of error, and the following-named papers filed therein, to wit, the citation, and proof of service thereof.

Circuit Court U. S. Northern District of Iowa.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Cedar Rapids, in said district, this 7th day of March, A. D. 1895.

A. J. VAN DUZEE,
Clerk of U. S. Circuit Court, Northern District of Iowa,
By P. H. FRANCIS, *Deputy.*

Filed Mar. 8, 1895.

JOHN D. JORDAN, *Clerk.*

Hartford Ins. Co. *et al. vs.* C., M. & St. P. R'y Co. Transcript for C. C. app.

40 And on the thirteenth day of March, A. D. 1895, an appearance of counsel for plaintiff in error was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

HARTFORD FIRE INSURANCE CO. *et al.*, Plaintiffs in Error, }
vs. } No. 614.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO. }

The clerk will enter my appearance as counsel for the plaintiffs in error.

CHAS. A. CLARK.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 614. Hartford Fire Insurance Co. *et al.*, pl'ffs in error, *vs.* C., M. & St. P. R'y Co. Appearance. Filed Mar. 13, 1895. John D. Jordan, clerk. Charles A. Clark, Cedar Rapids, Iowa, counsel for pl'ffs in error."

And on the twentieth day of April, A. D. 1895, an appearance of counsel for defendant in error was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO. } No. 614.

The clerk will enter my appearance as counsel for the defendant in error.

CHARLES B. KEELER.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 614. Hartford Fire Ins. Co. *et al.*, pl'ffs in error, *vs.* The C., M. & St. P. R'y Co. Appearance. Filed Apr. 20, 1895. John D. Jordan, clerk. Chas. B. Keeler, counsel for def't in error."

41 And on the fifth day of June, A. D. 1895, in the record of the proceedings of the United States circuit court of appeals, at the May term thereof, is an entry in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

WEDNESDAY, *June* 5, 1895.

THE HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, Defendant in Error. } No. 614.

In error to the circuit court of the United States for the northern district of Iowa.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Charles A. Clark in behalf of the plaintiffs in error, and the hour of adjournment having arrived before the conclusion thereof, further argument was postponed until tomorrow morning.

And on the sixth day of June, A. D. 1895, in the record of the proceedings of said United States circuit court of appeals, at the May term, 1895, thereof, is an entry of submission of said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

THURSDAY, *June* 6, 1895.

THE HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, Defendant in Error.
No. 614.

In error to the circuit court of the United States for the northern district of Iowa.

This cause having been called this day for further hearing, argument was continued by Mr. Charles A. Clark in behalf of the
42 plaintiffs in error and by Mr. Charles B. Keeler for defendant in error, and concluded by Mr. R. W. Barger for plaintiffs in error. Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the seventh day of October, A. D. 1895, an opinion of said circuit court of appeals was filed in said cause in the following words, to wit:

43 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1895.

HARTFORD FIRE INSURANCE COMPANY, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, and Dubuque Fire and Marine Insurance Company, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant in Error.
No. 614. In Error to the Circuit Court of the United States for the Northern District of Iowa.

Mr. Charles A. Clark and Mr. Richard W. Barger for plaintiffs in error.

Mr. Charles B. Keeler for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Statement.

On February 1, 1890, The Chicago, Milwaukee & St. Paul Railway Company, the defendant in error, leased to Simpson, McIntire & Company, a copartnership, certain portions of its depot grounds

at Monticello in the State of Iowa, "upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, (Simpson, McIntire & Company), for themselves and for their heirs, executors and administrators, and assigns do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of any building or buildings now on, or which may hereafter be placed on said premises, or of the fixtures, appurtenances, or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains, or cars running off the track or from the carelessness or negligence of employees or agents of said railway company." Simpson, McIntire & Company had, or constructed, a cold-storage building and warehouse on the leased premises, stocked it with butter and eggs, and insured the buildings and stock with the Hartford Fire Insurance Company and seven other insurance companies, which are the plaintiffs in error, and the buildings and stock were burned. The insurance companies brought an action against the railway company in the court below, and alleged in their complaint that they had insured Simpson, McIntire & Company against loss by fire on their cold-storage building, warehouse and stock, that these were destroyed by a fire cause- by the negligence of the railway company on November 11, 1892, that the insurance companies had paid Simpson, McIntire & Company $23,450 on account of their loss by this fire, that they were thereby subrogated to the rights of Simpson, McIntire & Company against the railway company, and were entitled to recover from it that amount with interest. The railway company answered this complaint, and one of the defenses it pleaded was the condition of the lease to Simpson, McIntire & Company by which they exempted and released the railway company from all liability for damage to their buildings and stock caused by fire set by the railway company. The plaintiffs in error demurred to this defense on the ground that this stipulation of the lease was against public policy and void; their demurrer was overruled and judgment was rendered against them thereon. The writ of error in this case was sued out to reverse this judgment, and the ruling upon the demurrer is the error assigned.

SANBORN, J., after stating the facts as above, delivered the opinion of the court:

Is a condition in a lease by a railway company of a portion of its right of way, that it shall not be liable to the lessee for any damage to any buildings or personal property thereon caused by fire set by its locomotives or by the negligence of its officers or servants, in violation of public policy, and therefore void? This is the question in this case.

The public policy of a state or nation must be determined by its constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public. Vidal *v.* Girard's Executors, 2 How. 127, 197; United

States *v.* Trans-Missouri Freight Association, 7 C. C. A. 15, 73, 58 Fed Rep. 58; Swann *v.* Swann, 21 Fed. Rep. 299.

If this was a question of local law or of the public policy of the State of Iowa alone, it would require little consideration by this court. There are many provisions of the statutes of the State of Iowa relating to the duties of individuals and corporations to use care to prevent damage from fire. The two which bear most directly upon the question under consideration in this case are sections 1209 and 1308 of the Code of that State, which provide: "That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway," (McClain's Annotated Code of Iowa, 1888 sec. 1972); and "No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into." McClain's Annotated Code of Iowa, 1888, sec. 2007. In Griswold *v.* Illinois Central Railroad Co., 57 N. W. Rep. 839, the supreme court of Iowa considered these statutes and the public policy of that State, and, after repeated argument and the most careful deliberation, held that a provision in a lease by a railway company of a portion of its right of way, on which the lessee had placed an elevator and warehouse and personal property, which exempted the railroad company from liability for damages by fire negligently communicated by its servants to these buildings and their contents, violated no law of that State, was not injurious to the public interests, and was not against public policy. This was the decision of the highest judicial tribunal of that State. It constitutes an authoritative construction of the statutes of the State (Dempsey *v.* Township of Oswego, 4 U. S. App. 416, 435, 2 C. C. A. 110, 51 Fed. Rep. 97; Rugan *v.* Sabin, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. Rep. 415; Travelers' Insurance Co. *v.* Oswego Township, 7 C. C. A. 669, 674, 59 Fed. Rep. 58; Madden *v.* Lancaster County, 12 C. C. A, 566, 570, 65 Fed. Rep. 188), and a very persuasive authority that the contract here in question is not contrary to public policy.

Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law and not dependent solely upon any local statute or usage. Over this question the national courts exercise concurrent jurisdiction with those of the State, and while the decisions of the latter are always entitled to the weight of persuasive authority, the Federal courts must in the end exercise their own judgment. Railroad Company *v.* Lockwood, 17 Wall. 357, 368; Myrick *v.* Michigan Central Railroad Company, 107 U. S. 102; Carpenter *v.* Providence Washington Ins. Co., 16 Peters 495, 511; Swift *v.* Tyson, 16 Peters 1; Railroad Company *v.* National Bank, 102 U. S. 14; Burgess *v.* Seligman, 107 U. S. 20, 33; Smith *v.* Alabama, 124 U. S. 465, 478; Bucher *v.* Cheshire Railroad Company, 125 U. S. 555, 583; Liverpool Steam Co. *v.* Phenix Insurance Co., 129 U. S. 397, 443.

We turn accordingly to the consideration of this question.

Before entering upon its discussion, it is important to note the terms and effect of the lease before us, and the situation of the parties, and of the property which was destroyed. Before the lease was made, the lessees had no right to enter upon, or to place any property upon, the leased premises, and the railway company owed to the lessees no duty to exercise ordinary care not to set fire
46 to any property on those premises, because presumptively there was none there, and because, if any one put any there, the only duty of the company was not willfully and wantonly to injure it, because it would be there in violation of law. If, however, the railway company should lease the right of way to Simpson, McIntire & Company, and should permit them to put buildings and personal property thereon, it would thereby subject itself to a new burden and assume a new duty—the duty of exercising ordinary care to prevent the burning of their property on these premises by the operation of its railroad. It was apparently willing to discharge all the duties it owed to the public and to every individual of the public, and it did not undertake, by this lease, to limit or restrict its liability to discharge any of those duties, but it simply undertook to prevent its assumption of a new duty. Its quasi-public character as a railroad company, its position as a common carrier, imposed upon it no duty to lease any of its right of way to these lessees or to any one else, nor had they or any one, any right to the use of the leased premises before this lease was made. The property that was burned was the private property of the lessees. None of it was in process of transportation by the railway company; none of it was awaiting delivery by the company to its consignees after transportation; and none of it had been received by the company for transportation. The warehouses and the property in them bore the same relation to the carrying business of the company, according to this record, that the store and contents of any merchant or commission man would bear to it. Neither the lease, nor the relation of the property to the railway company, arose out of the discharge of any duty imposed upon the corporation by its position of a common carrier or by its character of a quasi-public corporation.

The question then is, was it a violation of public policy for the lessees to agree, under these circumstances, that if they were permitted to put their buildings and property upon the right of way of the railroad company, and to use them thereon, the duties and liabilities of the latter to them, and to the public, should remain as they were before the lease was made, and should not be increased by any additional burden? No act of Congress, no statute, no decision of any court (except a decision of the supreme court of Iowa, which was overruled by Griswold *v.* Illinois Central Railroad Company, *supra*,) which prohibits such an agreement or declares it to be against public policy has been called to our attention. Counsel for plaintiffs in error present a carefully prepared and exhaustive argument by analogy, to show that such an agreement is detrimental to the public welfare and against public policy, but their contention rests entirely upon that argument. If the analogy fails, the argument fails. The argument runs in this

way: A contract by a railroad company with one of its employees or with a passenger, or with a shipper, to exempt itself from liability for negligence in operating its railroad is against public policy and void (Kansas Pacific R'y Co. *v.* Peavy, 29 Kansas 169; Little Rock & Ft. Smith R'y Co. *v.* Eubanks, 48 Ark. 460; Railroad Company *v.* Lockwood, 17 Wall. 357; Express Company *v.* Caldwell, 21 Wall. 264, 267; York Company *v.* Central Railroad, 3 Wall. 107; Bank of Kentucky *v.* Adams Express Company, 93 U. S. 174, 181, 183, 185; Liverpool Steam Company *v.* Phenix Insurance Co., 129 U. S. 440, 441); the contract to exempt the railway company from liability for damage to the property of these lessees caused by fires resulting from the negligence of the railway company is similar to contracts with its employees, passengers and shippers to exempt it from liability to them for negligence in operating its railroad; therefore, the provision for exemption in this lease is against public policy and void. But the analogy fails in that vital part, which constitutes the reason and foundation of the rule established by the authorities cited. Its fallacy is, that the law imposes upon a railroad company the absolute duty to operate its railroad, to employ suitable men to operate it, to exercise ordinary care to furnish them with a reasonably safe place in which to render their services, and with reasonably safe machinery and appliances with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interests, because it endangers the lives and limbs of citizens which are of the highest value to the State and Nation. A contract, which exempts the carrier from negligence in the discharge of these duties, is void because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably endangers the lives of employees and passengers. But the law imposes no duty upon a railroad company to lease its right of way or to use ordinary care not to set fires that would burn property placed upon it by strangers without its permission. In the former case public policy and the law impose upon the carrier the duty to hire employees, to operate its railroad with reasonable care in order to protect its employees from injury, and therefore it may not contract to be relieved from the law and the duty. The carrier has no choice. It must perform these duties or forfeit its charter. In the latter case no duty to lease is imposed. The company has the option—the choice to lease or to refuse to lease,—and if it does lease, and does stipulate for indemnity from damages caused by its negligence in firing the property of the lessee placed upon the leased premises by its permission, that contract in no way relieves it from the discharge of any duty to the public or to any citizen that the law or public policy had imposed upon it.

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Again, the law imposes upon a railroad company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost, and the latter with ordinary care. The passenger is often obliged to travel, and the shipper to send his goods, by railroad. In making their contracts they do not stand on an equal footing with it. They cannot stop to negotiate and settle

the terms of a contract, every time they desire to use the railroad. They would often prefer the abandonment of the contracts to such negotiations. On the other hand, the railroad company with its trained employees, and its monopoly of the transportation facilities sought, has the ability and the power to exact the contract it desires. This inequality in the situation of the parties, which would, if permitted, enable the railroad company to obtain unfair contracts from passengers and shippers, and the fact that contracts with them,
48 which exempt the company from liability for negligence, relieve it from an absolute duty imposed by the law, and thus violate it, and at the same time increase the danger to the lives and property of the people from the operation of a railroad, constitute the reasons for the decisions that have established and maintain the rule that such contracts are against public policy. Railroad Company *v.* Lockwood, 17 Wall. 357, 369, 378, 379; York Company *v.* Central Railroad, 3 Wall. 107, 112; Express Company *v.* Kountze Brothers, 8 Wall. 342, 353; Liverpool Steam Company *v.* Phenix Insurance Company, 129 U. S. 397, 440, 443; Express Company *v.* Caldwell, 21 Wall. 264, 267, 268.

But the defendant in error and Simpson, McIntire & Company did not stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute, or to refuse to execute the lease. The condition exempting the company from liability for damages to the property of the lessees caused by fire set by the negligence of the company relieved the company from no duty it was required by law to perform, but simply provided that it should not assume an additional burden, which it had the option to take or to refuse. Thus in the case at bar all the reasons for the rule avoiding contracts exempting common carriers from liability for negligence failed, and it is difficult to perceive how the proposition that this rule should govern this case can be successfully maintained.

It is said that it was the duty of the railroad company to furnish suitable warehouses for the receipt of butter and eggs offered to it for transportation, and already transported, but awaiting delivery to the consignees, that it was bound to exercise ordinary care not to burn the contents placed in such warehouses by it as a carrier, and that if it employed Simpson, McIntire & Company to receive and store the goods of its shippers, it was bound to exercise the same degree of care to protect the goods in their possession. Covington Stock Yards Co. *v.* Keith, 139 U. S. 128, 133, 136. It is a conclusive answer to this contention that there is nothing in this record to show that the railroad company ever had employed Simpson, McIntire & Company to receive or store any of the goods of its shippers. Moreover, if it had done so, it is not perceived why the contract of these lessees to take the risk of, and to hold the railroad company harmless from, any damage to such property from fires caused by the negligent operation of the railroad, would not have been valid. It goes without saying that a railroad company could have legally employed an insurance company to indemnify it against loss by fire

occasioned by the negligence of its servants. If there were goods of its customers burned in the warehouse, the lessees had in effect insured the railroad company against damages for their loss, and the insurance companies had insured the lessees. No reason is perceived why these contracts were not valid.

It is said that a statute which should provide that a railroad company should not be liable to the owner of property for damages to it by fire caused by the negligence of the company, would be
49 unconstitutional and void because it would authorize the taking of private property without due process of law and without compensation, and that therefore the contract here in question is void. But a statute enacting that a private individual who should construct a building or store personal property upon the right of way of a railroad company, should be deemed guilty of negligence and should not be permitted to maintain any action against the company for its destruction by fire occasioned by the negligence of the latter in the operation of its railroad, would not be obnoxious to this objection nor detrimental to the public interest, and it is not perceived how a contract to that effect could be.

The public policy of this nation with reference to contracts of common carriers exempting them from liability for negligence, was established and declared by the decisions of the Supreme Court in Railroad Company *v.* Lockwood, 17 Wall. 357, 384; Express Company *v.* Caldwell, 21 Wall. 264, 267, 268; and Liverpool Steam Company *v.* Phenix Insurance Company, 129 U. S. 397, 440, 441. In the leading case of Railroad Company *v.* Lockwood, 17 Wall. 357, 384, Mr. Justice Bradley declared the rules by which the validity of such contracts must be determined to be:

"First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

"Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter."

In Liverpool Steam Company *v.* Phenix Insurance Company, 129 U. S. 397, at page 441 Mr. Justice Gray thus states the rule in a single paragraph:

"Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy are upheld; such as those exempting the carrier from responsibility for losses happening from accident or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. United States *v.* Trans-Missouri Freight Association, 7 C. C. A. 15, 82, 58 Fed. Rep. 58; Printing and Registering Company *v.* Sampson, L. R. 19 Eq. Cas. 462; Tallis *v.* Tallis, 1 El. & Bl. 391; Rousillon *v.* Rousillon, L. R. 14, Ch. Div. 351, 365; Stewart *v.* Transportation Company, 17 Minn. 372, 391; Marsh *v.* Russell, 66 N. Y. 288; Phippen *v.* Stickney, 3 Metc.
50 (Mass.) 384, 389. In our opinion the plaintiffs in error fall far short of sustaining this burden, and our conclusions are:

The reasons why an unreasonable and unjust contract between a common carrier and another exempting the former from liability for negligence is against public policy and void are, that it attempts to release the carrier from the discharge of the essential duties imposed upon it by law, that the parties to the contract are not upon an equal footing, and that it tends to endanger the lives and limbs of passengers and employees.

A contract in a lease, by a railroad company, of a portion of its right of way, that it shall not be liable to the lessees for any damage caused by fire set, by the negligence of itself or of its employees, to the buildings or personal property which the lessees have or place on the leased premises, does not fall within this rule and is not void because it does not fall within its reasons.

A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier or as a quasi-public corporation. The contract leaves it under the same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity and care after a lease containing such a contract is executed, that it would have been required to exercise, if no such agreement had been made. Express Company *v.* Caldwell, 21 Wall. 264, 267, 268. The only effect of the contract is to prevent the assumption by the railroad company of a new duty which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employees or passengers of the company, and the parties to it stand upon an equal footing when the lease is made, because each is free to make or refuse to make the contract.

For these reasons the judgment below must be affirmed with costs, and it is so ordered.

CALDWELL, *J.*, dissenting:

I concur in the conclusion reached in this case but dissent from this statement in the majority opinion, namely: "Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law and not dependent solely upon any local statute or usage."

The contract referred to is a lease of real estate situated in Iowa. The lease was made and executed and its covenants were to be performed in that State. The supreme court of Iowa held the lease and all its conditions valid under the laws of that State. No de-

cision of the Supreme Court of the United States has been cited, and it is believed none can be found, holding that this decision of the supreme court of Iowa is not binding on this court. But however this may be, there is no difference of opinion between the supreme court of Iowa and this court as to the validity of the lease and all its conditions, and there is, therefore, no occasion for this court to express an opinion upon the question whether it would be bound by the decision of the supreme court of Iowa if the two courts differed in opinion on the question of public policy.

51 What is said on this subject is not necessary to the decision of the case; and moreover, is not law. A "local statute" declaring such a condition in a lease to be either valid or void would undoubtedly be obligatory on this and all other courts.

There are weighty reasons why a question of this character should not be lightly considered. The most serious blot on the American system of jurisprudence is that whereby a question affecting the rights and liabilities of a citizen may be differently decided by courts of different governments, whose judgments are equally binding, and final. This unfortunate condition of our jurisprudence results from our dual system of government. It has no existence in any other country and ought to be confined within the narrowest limits possible in this. Nothing can be more repugnant to one's sense of justice or to a uniform and harmonious administration of the law than to require the citizen to be bound by conflicting decisions of courts of different governments. Under the operation of this unseemly rule, a suit against one in a State court may be decided one way and a suit against the same party in the Federal court involving the very same question may be decided the other way. As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into that jurisdiction whose rules of decision are believed to be most favorable to his side of the case.

It was the hope that this court would overrule the decision of the supreme court of Iowa in a similar case that caused the removal of this case into the circuit court. The class of questions as to which different rules of decision may obtain and the Federal courts may disregard the decision of the State courts thereon, has not been very clearly defined. What is said here has reference of course to non-Federal questions such as the one raised in this case. As to Federal questions there is but one rule of decision and one court of last resort.

The general statement has been often made that the Federal courts are not bound to follow the decisions of State courts on questions of general jurisprudence, when unaffected by State legislation; but no exact enumeration has ever been made, or ever can be made, of the questions that come within this general definition. Moreover, the decisions of the supreme court relating to the subject are not uniform or harmonious.

The question as presented by this record is not free from doubt. It is a question upon which the court should not express an opinion except when necessary to the decision of the case and that necessity does not exist in this case.

Filed October 7, 1895.

52 And on the seventh day of October, A. D. 1895, in the record of the proceedings of said United States circuit court of appeals, at the May term, 1895, thereof, is an entry of judgment in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *October* 7, 1895.

THE HARTFORD FIRE INSURANCE COMPANY, NIAGARA Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, and Dubuque Fire and Marine Insurance Company, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant in Error. } No. 614.

In error to the circuit court of the United States for the northern district of Iowa.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Iowa, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the Chicago, Milwaukee and St. Paul Railway Company have and recover against the Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, and Dubuque Fire and Marine Insurance Company the sum of twenty dollars for its costs herein and have execution therefor.

October 7, 1895.

53 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing pages, from one to fifty-two, inclusive, contain a full, true, and complete copy of the transcript, pleadings, proceedings, and the opinion of said United States circuit court of appeals in a certain cause wherein The Hartford Fire Insurance Company *et al.* were plaintiffs in error and The Chicago, Milwaukee & St. Paul Railway Company, defendant in error, No. 614, May term, 1895, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that on the fourteenth day of December, A. D.

1895, a mandate was issued in said cause and transmitted to the circuit court of the United States for the northern district of Iowa.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, in the eighth circuit, this thirtieth day of December, A. D. 1895.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

54 In the United States Circuit Court of Appeals, Eighth Circuit.

HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant in Error.
} No. 614. Stipulation.

It is hereby stipulated by and between the parties to the above-entitled cause that the certified transcript of the record in said cause, filed in the Supreme Court of the United States, with the petition of the plaintiffs in error for a writ of certiorari, shall be taken as a full and sufficient return to the writ of certiorari issued by the Supreme Court in this cause.

Dated at Chicago this 21st day of April, A. D. 1896.

CHARLES A. CLARKE AND
R. W. BARGER,
Counsel for Plaintiffs in Error.
CHARLES B. KEELER,
Counsel for Defendant in Error.

Endorsed: In the United States circuit court of appeals, 8th circuit. Hartford Fire Ins. Co. *et al.*, plaintiffs in error, *vs.* The Chicago, Milwaukee & St. Paul R'y Co., defendant in error. Stipulation. Filed Apr. 22, 1896. John D. Jordan, clerk. Charles A. Clarke and R. W. Barger, 809–810 Home Insurance building, Chicago, counsel for plaintiffs in error.

A true copy.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Hartford Fire Insurance Company *et al.* are plaintiffs in

error and The Chicago, Milwaukee & St. Paul Railway Company is defendant in error, No. 614, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
56 of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

57 *Return to Writ.*

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ and in accordance with the stipulation of counsel for the respective parties, I do hereby certify that the transcript of record in the case of The Hartford Fire Insurance Company *et al.*, plaintiffs in error, *vs.* The Chicago, Milwaukee and St. Paul Railway Company, filed with the petition for a writ of certiorari, is a full, true, and complete transcript of the record in said cause.

I further certify that the copy of the stipulation hereto attached is a true and complete copy of the stipulation above referred to.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Mo., in the eighth circuit, this 22nd day of April, A. D. 1896.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Supreme Court of the United States, October term, 1895. No. 876. The Hartford Fire Insurance Co. *et al. vs.* The Chicago, Milwaukee & St. Paul Railway Co. Writ of certiorari.

[Endorsed:] Case No. 16,166. Supreme Court U. S., October term, 1895. Term No., 115. The Hartford Fire Ins. Co. *et al.*, pl'ffs in error, *vs.* The Chicago, Milwaukee & St. P. R. R. Co. Writ of certiorari and return. Filed April 25, 1896.